

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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	:	
WAYNE BERRY,	:	
	:	
	:	
Plaintiff,	:	
	:	
- against -	:	No. 07-CV-07634 (HB) (AJP)
	:	
DEUTSCHE BANK TRUST COMPANY	:	
AMERICAS (F.A. BANKERS TRUST	:	
COMPANY) AND JP MORGAN CHASE BANK	:	
IN THEIR SEPARATE CAPACITIES AND AS	:	
AGENTS FOR THE PRE AND POST-PETITION	:	
LENDERS OF FLEMING COMPANIES, INC.,	:	
GENERAL ELECTRIC CAPITAL	:	
CORPORATION; C&S WHOLESALE	:	
GROCERS, INC., DOES 1-20 TO 200,	:	
	:	
Defendants.	:	
	:	
-----	X	

DECLARATION OF LEX R. SMITH

LEX R. SMITH declares, under penalty of perjury pursuant to 28 U.S.C.A. §
1746, that:

1. I am an attorney; a member in good standing of the bars of the State of Hawaii, the United States District Court for the District of Hawaii, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court; and am fully familiar with the facts below.
2. I represented C&S Wholesale Grocers Inc. ("C&S") in litigation originally filed in Hawaii by Plaintiff Wayne Berry and captioned *Berry vs. Hawaiian Express Service Inc.*, Civ No. CV 03 00385 SOM-LEK (D. Hawaii) (the "Hawaii Case").

3. Attached as Exhibit A to this Declaration are true copies of relevant pages from the August 4, 2003 transcript of proceedings before the Honorable Mary Walrath in the bankruptcy of the Fleming Companies, Inc. in the United States Bankruptcy Court for the District of Delaware.

4. Attached as Exhibit B to this Declaration is a true copy of the First Amended Complaint filed by Plaintiff Wayne Berry in the Hawaii Case on August 13, 2003. His pleadings prior to August 13, 2007 had not named C&S as a defendant.

5. Attached as Exhibit C to this Declaration is a true copy of the Second Amended Verified Complaint filed in the Hawaii Case on June 18, 2004.

6. Attached as Exhibit D to this Declaration is a true copy of an Order entered in the Hawaii case on June 27, 2005 granting summary judgment in favor of C&S and others on all claims.

7. Attached as Exhibit E to this Declaration is a true copy of a final judgment entered in the Hawaii Case on March 16, 2006 in favor of C&S and others.

8. Attached as Exhibit F to this Declaration is a true copy of an October 25, 2006 Report and Recommendation of the Honorable Magistrate Judge Leslie Kobayashi recommending an award of attorneys' fees to C&S in the Hawaii Case.

9. Attached as Exhibit G to this Declaration is a true copy of a March 2, 2007 Order of United States District Judge Susan O. Mollway in the Hawaii Case, adopting the Magistrate Judge's recommendation to award attorneys' fees to C&S.

10. Attached as Exhibit H to this Declaration are printouts from the official website of the United States Copyright Office relating to each of the copyright registrations cited by Plaintiff in his First Amended Complaint in the case now before this Court in New York.

These official records confirm that each of the programs registered by Plaintiff and a subject of his current lawsuit was created years before this case or the Hawaii Case was filed. The dates claimed by Plaintiff for the creation of those programs are summarized from those official records in the chart below:

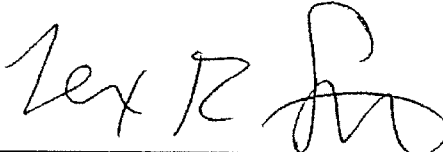
Registration Number	Date of Creation
TX0005079445	1993
TX0005268865	1999
TXu001277726	1999
TXu001302622	1998
TXu001302623	1997
TXu001302624	1998
TXu001302625	1998
TXu001302626	2993 (sic)
TXu001302627	2993 (sic)
TXu001340295	1998
TXu001340296	1996
TXu001340297	1998
TXu001340298	1998
TXu001340299	1996
TXu001340300	1998
TXu001340301	1998
TXu001340302	1996

11. Attached as Exhibit I to this Declaration is a true copy of the First Amended Complaint in the case now pending before this Court in New York.

12. The reference by Plaintiff in his current First Amended Complaint to deposition questions asked of him by me relates to questions in a deposition taken on August 13, 2007 in Honolulu, Hawaii in an attempt to find assets or funds of Plaintiff for purposes of enforcing the award of attorney's fees in favor of C&S in the Hawaii case. Three of 118 pages of the examination, a copy of which are attached as Exhibit J to this Declaration, were taken up with the subject of Plaintiff's guns (some of the few hard assets Plaintiff admitted to owning).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Honolulu, Hawaii
September 5, 2007



Lex R. Smith